

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK

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ERICA LYNN C.,

Plaintiff,

v.

Civil Action No.  
5:20-CV-0394 (DEP)

ANDREW SAUL, Commissioner of Social  
Security,

Defendant.

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APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF

LEGAL AID SOCIETY  
221 South Warren Street  
Syracuse, NY 13202

ELIZABETH V. LOMBARDI, ESQ.

FOR DEFENDANT

SOCIAL SECURITY ADMIN.  
625 JFK Building  
15 New Sudbury St  
Boston, MA 02203

JESSICA RICHARDS, ESQ.

DAVID E. PEEBLES  
U.S. MAGISTRATE JUDGE

ORDER

Currently pending before the court in this action, in which plaintiff seeks judicial review of an adverse administrative determination by the

Commissioner of Social Security (“Commissioner”), pursuant to 42 U.S.C. §§ 405(g) and 1383(3)(c), are cross-motions for judgment on the pleadings.<sup>1</sup> Oral argument was heard in connection with those motions on May 19, 2021, during a telephone conference conducted on the record. At the close of argument, I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner’s determination resulted from the application of proper legal principles and is supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

After due deliberation, and based upon the court’s oral bench decision, which has been transcribed, is attached to this order, and is incorporated herein by reference, it is hereby

ORDERED, as follows:

1) Defendant’s motion for judgment on the pleadings is  
GRANTED.

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<sup>1</sup> This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order once issue has been joined, an action such as this is considered procedurally, as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

2) The Commissioner's determination that the plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is AFFIRMED.

3) The clerk is respectfully directed to enter judgment, based upon this determination, DISMISSING plaintiff's complaint in its entirety.

A handwritten signature in black ink, appearing to read "David E. Peebles", written over a horizontal line.

David E. Peebles  
U.S. Magistrate Judge

Dated: May 27, 2021  
Syracuse, NY

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

-----x  
ERICA L. C.,

Plaintiff,

vs.

5:20-cv-394

ANDREW SAUL, Commissioner  
Social Security Administration,

Defendant.  
-----x

*Transcript of DECISION* held on May 19, 2021

the HONORABLE DAVID E. PEEBLES

United States Magistrate Judge, Presiding

APPEARANCES (by telephone)

For Plaintiff:     LEGAL AID SOCIETY  
                      221 South Warren Street  
                      Syracuse, New York 13202  
                      BY:   ELIZABETH VICTORIA LOMBARDI, ESQ.

For Defendant:    SOCIAL SECURITY ADMINISTRATION  
                      15 New Sudbury Street  
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                      BY:   JESSICA RICHARDS, ESQ.

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*Official United States Court Reporter*  
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1           THE COURT: Let me begin by thanking both counsel  
2 for excellent presentations. I've enjoyed working with you  
3 on this matter.

4           I have before me a challenge to an adverse  
5 determination by the Commissioner of Social Security finding  
6 that plaintiff was not disabled at the relevant times and,  
7 therefore, ineligible for the benefits she sought. The  
8 challenge is raised under 42, United States Code, Sections  
9 405(g) and 1383(c)(3).

10           The background is as follows. Plaintiff was born  
11 in August of 1978. She is currently 42 years old. She was  
12 34 years of age at the alleged onset of her disability on  
13 October 24, 2012, and 37 at the time of her application for  
14 benefits on May 23, 2016. Plaintiff stands approximately  
15 5-foot, 5-inches in height and weighs approximately  
16 245 pounds.

17           The record is ambiguous as to the extent of the  
18 plaintiff's education. At page 826 it suggests she has a  
19 10th grade education; at page 304, a 7th grade education; and  
20 at 60, a 9th grade education. It's clear that she was in  
21 regular classes while in school and did not achieve a GED.

22           Plaintiff is divorced. She has three children who  
23 reside with their father. Plaintiff lives in Carthage,  
24 New York, in an apartment with her boyfriend and brother.  
25 She does not drive, nor does she use public transportation.

1           Plaintiff's work history is also somewhat  
2 ambiguous. She worked as a hotel housekeeper for several  
3 years. She told Dr. Noia that she left that position when  
4 she was hit by a car. From 2008 until 2011 she was a home  
5 aide and cleaner for her father and her father's friend, her  
6 father being a quadriplegic. Her father died in 2011. She  
7 stated she could not go back to work and did not look for  
8 work after that; page 62 of the Administrative Transcript.

9           Plaintiff suffers from some physical conditions,  
10 including diabetes mellitus, which is medically controlled;  
11 chronic obstructive pulmonary disease, or COPD; right knee  
12 pain; obesity; she claims Crohn's Disease; she suffers from  
13 hypertension and a heart issue.

14           Mentally, plaintiff has experienced various issues  
15 that have been at different times diagnosed or categorized as  
16 post-traumatic stress disorder, or PTSD; panic disorder;  
17 major depressive disorder without psychotic features; anxiety  
18 disorder; substance and alcohol abuse history, including  
19 cannabis abuse; and agoraphobia with panic disorder.

20           Some of the stressors that she has experienced in  
21 her lifetime include the death of her father from a seizure  
22 disorder, that's at 826, and her mother's suicide within  
23 three weeks thereafter based on an overdose. She also  
24 witnessed in 2014 her brother overdosing and committing  
25 suicide.

1           Plaintiff was taken to the emergency room on  
2 June 21, 2017, after having taken 15 Klonopin pills. She was  
3 admitted to the hospital and resided there from that day  
4 until June 29, 2017. The record is somewhat unclear as to  
5 whether that was a suicide attempt. She denied having tried  
6 to commit suicide at both the emergency room, at 345 of the  
7 Administrative Transcript, and later in the hospital, at 423.

8           Plaintiff has had a series of primary providers;  
9 Dr. Patel, who she was not happy with, his treatment notes do  
10 not appear in the record; Dr. Jocelyn Beane, who she began  
11 seeing in August of 2016; and Dr. Daniel Krebs, who she began  
12 treating with in February of 2018.

13           For her mental health needs, she treats at the  
14 Carthage Area Behavioral Health Center. She sees Physician  
15 Assistant, or PA, Caleb Richter, and LMSW Kenneth Alcom. She  
16 was evaluated initially January 2016, at 237 and following in  
17 the Administrative Transcript. The plaintiff actually began  
18 treating there, according to some of the records, in  
19 September of 2015. Plaintiff was discharged from that  
20 treatment center based on attendance issues in July of 2018,  
21 at 792, but was later reinstated in the fall of 2018. That's  
22 at 825 of the Administrative Transcript.

23           Plaintiff has been prescribed various medications  
24 over time, including Prazosin, Hydroxyzine, Celexa,  
25 Bupropion, Ventolin, Lyrica, Buspirone, Propranolol, Topamax,

1 Omeprazole, Gabapentin, Klonopin, Lisinopril and Rozerem.

2 In terms of activities of daily living, plaintiff  
3 is able to dress, bathe, groom, cook, clean, do laundry,  
4 shop, read. She likes poetry and she likes Greek mythology.

5 Plaintiff is a former smoker and an occasional  
6 marijuana user. There is evidence that she abused alcohol in  
7 the past. There is also some indication in the records of  
8 drug seeking conduct.

9 Procedurally, plaintiff applied for Title XVI  
10 Supplemental Security Income benefits on May 23, 2016. As  
11 the Commissioner notes, that was her third such application.  
12 In it she alleged an onset date of October 24, 2012, and  
13 claimed disability based on PTSD, ADD, diabetes, bipolar  
14 disorder, agoraphobia, COPD, Crohn's disease, congestive  
15 heart failure, and high blood pressure.

16 A hearing was conducted on August 8, 2018, by  
17 Administrative Law Judge Elizabeth Koennecke to address  
18 plaintiff's claim for benefits. A supplemental hearing with  
19 a vocational expert was conducted on February 5, 2019. On  
20 February 12, 2019, ALJ Koennecke issued an unfavorable  
21 decision which contained a final determination of the  
22 Commissioner on February 26, 2020, when the Social Security  
23 Administration Appeals Council denied plaintiff's request for  
24 review. This action was commenced on April 2, 2020, and is  
25 timely.



1           In her decision ALJ Koennecke applied the familiar  
2 five-step sequential test for determining disability.

3           She noted at step one that plaintiff had not  
4 engaged in substantial gainful activity since the date of her  
5 application.

6           At step two, she concluded that plaintiff does  
7 suffer from impairments that impose more than minimal  
8 limitations on her ability to perform basic work functions.  
9 They were characterized at page 12 of the Administrative  
10 Transcript as, "all mental impairments as variously  
11 characterized."

12           At step three, ALJ Koennecke concluded that  
13 plaintiff's conditions do not meet or medically equal any of  
14 the listed presumptively disabling conditions set forth in  
15 the Commissioner's regulations, specifically considering  
16 listings 12.04, 12.06, 12.08 and 12.15. The ALJ next  
17 determined that notwithstanding her impairments, plaintiff  
18 retains the residual functional capacity, or RFC, to perform  
19 medium work with some additional limitations addressing her  
20 mental conditions and the resulting functional limitations.

21           At step four, the ALJ concluded that plaintiff is  
22 incapable of performing her past relevant work.

23           At step five, she noted initially that if plaintiff  
24 was capable of performing a full range of medium work, a  
25 finding of no disability would be required by the

1 Medical-Vocational Guidelines, or Grids, and specifically  
2 Grid Rule 203.26, relying on the testimony of the vocational  
3 expert and based upon the additional non-exertional  
4 limitations that erode the job base on which the Grids are  
5 predicated. The ALJ, nonetheless, concluded that plaintiff  
6 is capable of performing work available in the national  
7 economy, and cited three representative occupations as order  
8 picker, salvage laborer, and laundry laborer. And,  
9 therefore, concluded that plaintiff was not disabled at the  
10 relevant times.

11 As you know, the Court's function in this case is  
12 limited to determining whether correct legal principles were  
13 applied and the resulting determination is supported by  
14 substantial evidence, which is defined as such relevant  
15 evidence as a reasonable mind would conclude sufficient to  
16 support a finding.

17 The Second Circuit has noted in *Brault versus*  
18 *Social Security Administration Commissioner*, 683 F.3d 443  
19 (2d. Cir. 2012), that this is an extremely deferential  
20 standard; it is even more rigorous than the clearly erroneous  
21 standard that lawyers are familiar with. Under the standard,  
22 once an ALJ finds a fact, that fact can be rejected only if a  
23 reasonable factfinder would have to conclude otherwise.

24 The plaintiff in this case has raised potentially  
25 two arguments; one alleging that improper weight was given to

1 medical opinions, including those opinions of Dr. Dennis  
2 Noia, a consultative examiner; Physician Assistant Richter  
3 and LMSW Alcom; and Dr. Hennessey, a state agency consultant.  
4 The second argument is that the Administrative Law Judge  
5 failed to mention and properly evaluate the diagnosis of  
6 fibromyalgia and its effect on plaintiff's ability to perform  
7 work functions.

8           Turning first to the weight of the medical  
9 evidence, this case, of course, is governed by the prior  
10 regulations that were in effect until March of 2017. Under  
11 20 CFR Section 404.1527, any medical opinion given must be  
12 evaluated, medical opinion being defined as an opinion given  
13 by an acceptable medical source. In this case we have no  
14 opinions from any treating sources that qualify as acceptable  
15 medical sources, so the treating source rule, of course, does  
16 not apply.

17           We do have an opinion from Dr. Noia. It is dated  
18 May 8, 2018. The written evaluation appears at 304 to 308 of  
19 the Administrative Transcript. The check-box form that  
20 summarizes the findings appears at 310 through 312. The  
21 finding of Dr. Noia is that plaintiff suffers from no  
22 limitations in certain areas, mild limitations in certain  
23 areas, moderate limitations in interacting adequately with  
24 supervisors, co-workers and the public, and marked  
25 limitations in regulating emotions, controlling behavior, and

1 maintaining well-being.

2           The findings of Dr. Noia are discussed in fairly  
3 significant detail at page 13 and again 16 of the  
4 Administrative Transcript. During the Administrative Law  
5 Judge's decision it is given significant weight. Admittedly,  
6 the ALJ did not adopt all of Dr. Noia's limitations, some of  
7 which do not appear to translate directly into work  
8 functions, like marked limitations and controlling behavior,  
9 regulating emotions, maintaining well-being. There is, of  
10 course, no requirement that the RFC finding track in toto any  
11 one medical opinion.

12           The Administrative Law Judge concluded that some of  
13 the limitations are not supported by Dr. Noia's exam. He  
14 cited an October 9, 2018, counseling note at page 828 of the  
15 Administrative Transcript that shows normal functioning, and  
16 he cited the activities of daily living that the plaintiff  
17 experiences.

18           In my view, the residual functional capacity  
19 finding of ALJ Koennecke does accommodate many, if not most,  
20 of the limitations expressed there, including the limitation  
21 that she not have any contact with the general public.  
22 Dr. Noia's limitation on the ability to maintain a schedule  
23 is acknowledged at page 13 of the Administrative Transcript,  
24 and an explanation is given at page 16 as to why it is not a  
25 limitation set forth in the residual functional capacity

1 finding. Again, the ALJ cites mostly normal exams, the  
2 ability to maintain a schedule of appointments, and the fact  
3 that from the record it appears that any missed appointments  
4 that led to the termination of the treatment relationship at  
5 Carthage Behavioral came as a result of unreliable  
6 transportation, rather than plaintiff's inability to bring  
7 herself to go to the doctor.

8           There is some indication of some antisocial  
9 behavior, but several of those incidents appear to coincide  
10 with periods of intoxication. For example, there was an  
11 incident in the emergency room of a hospital, reported at 918  
12 and 919 of the Administrative Transcript, where plaintiff was  
13 behaviorally out of control and the police had to be called.

14           It was noted that Dr. Noia's exam showed normal  
15 social skills. It was noted that she meets weekly in her own  
16 home with a religious organization group. She was able to  
17 visit Florida, take a trip to Florida. And that the cycles  
18 of improvement and worsening seem to coincide with medication  
19 issues.

20           My finding is that the Administrative Law Judge's  
21 discussion of Dr. Noia's opinion allows her meaningful  
22 judicial review, the resulting residual functional capacity  
23 is supported by substantial evidence, and I cannot say that a  
24 reasonable factfinder would have to weigh it differently.

25           When it comes to LMSW Alcom and PA Richter, LMSW

1 Alcom gave a December 9, 2016, opinion that appears at pages  
2 337 to 340 of the record. Notably, on the first page it is  
3 indicated client is expected to make a full recovery once she  
4 is able to process her grief/trauma. There are some  
5 limitations noted, but many of them deal with understanding  
6 and remembering complex instructions and carrying out complex  
7 instructions, which do not come into play in this case, and  
8 interacting appropriately with the public, which, of course,  
9 is accommodated in the RFC.

10 LMSW Alcom, of course, is not an acceptable medical  
11 source. The opinion is dealt with in the discussion of ALJ  
12 Koennecke and it doesn't vastly differ from the RFC finding.  
13 The second is an opinion given by both PA Richter and LMSW  
14 Alcom on July 25, 2018. It appears at 800 to 805. Once  
15 again, it indicates Erica has the capacity to return to  
16 normal functioning. There are some limitations indicated in  
17 the areas of none to moderate. I didn't see any indication  
18 of marked limitations.

19 There was a statement that was discussed by the  
20 Administrative Law Judge. The statement is -- well, the  
21 question that was responded to is, "Is there ongoing medical  
22 treatment, medication, mental health therapy, psychosocial  
23 support, or a highly-structured setting that diminishes signs  
24 or symptoms?" At page 804. The answer is "Yes." The  
25 Administrative Law Judge discussed that statement and it was

1 rejected at page 15. The rejection is explained, and I  
2 cannot say that a reasonable factfinder would have to  
3 conclude otherwise.

4 The opinions of both LMSW Alcom and PA Richter were  
5 discussed at page 16 and given some weight. I find that the  
6 explanation is satisfactory and supported by substantial  
7 evidence. Again, I note neither is an acceptable medical  
8 source.

9 There was some suggestion that the plaintiff may be  
10 making a step three argument that the C criteria could be met  
11 in this case. That argument, in my view, is waived because  
12 it was not expressly set out in the plaintiff's brief.  
13 Nonetheless, the finding that plaintiff did not experience a  
14 highly-structured environment in going to the doctor on a  
15 biweekly basis, or a therapist, I should say, is  
16 well-supported. There is also no indication of a marginal  
17 adjustment, which is defined in 20 CFR, Part 404, Subpart P,  
18 Appendix 1 at 12.00G, especially since LMSW Alcom and PA  
19 Richter have given opinions that suggest that plaintiff can  
20 make a full recovery and return to normal functioning.

21 The opinion of Dr. Hennessey was considered. He is  
22 a non-examining agency consultant. His opinions appear at 84  
23 through 90. He is unable to make significant findings or to  
24 assess functional limitations, especially since plaintiff  
25 apparently did not keep an appointment for a consultative

1 exam. The RFC finding was more limiting than Dr. Hennessey's  
2 opinion, which is certainly proper and I find no error there.

3 Turning to the second argument raised addressing  
4 the diagnosis of fibromyalgia. It is true that it appears  
5 that Dr. Krebs did diagnosis or at least list on a couple of  
6 occasions a diagnosis of fibromyalgia. Fibromyalgia, of  
7 course, is a somewhat elusive infirmity. It's addressed in  
8 SSR 12-2p. As the Commissioner argues, the mere diagnosis  
9 without more of fibromyalgia is not sufficient to establish a  
10 medically determinable impairment.

11 That ruling sets forth two alternative means of  
12 diagnosing fibromyalgia. The first requires a history of  
13 widespread pain, at least 11 positive tender points on  
14 physical examination, and evidence that other disorders that  
15 could cause the symptoms or signs were excluded.  
16 Alternatively, it can be established through a history of  
17 widespread pain, repeated manifestations of six or more  
18 fibromyalgia symptoms, signs, or co-occurring conditions,  
19 and, once again, evidence of other disorders that could cause  
20 the repeated manifestations were excluded.

21 Plaintiff doesn't argue that the first means have  
22 been met. With regard to the second, the record doesn't  
23 establish a history of widespread pain. It establishes  
24 certainly that plaintiff has experienced pain in various  
25 locations over time, but those seem to be tied to injuries or



1 in one case arthritis, but there doesn't appear to be any  
2 evidence of other disorders that could cause those repeated  
3 manifestations of symptoms were also excluded.

4 So I find no error, and if there was error it's  
5 harmless error, in failing to discuss fibromyalgia. I do  
6 note that in her functional report plaintiff did not claim  
7 disability based on fibromyalgia, and nor was there a claim  
8 during her hearing that was one of the causes of her  
9 inability to perform work functions.

10 So, in sum, I find that the resulting determination  
11 was the product of correct legal principles and is supported  
12 by substantial evidence. I will grant judgment on the  
13 pleadings to the defendant and order dismissal of plaintiff's  
14 complaint.

15 Once again, thank you both for your presentations  
16 and I hope you stay well.

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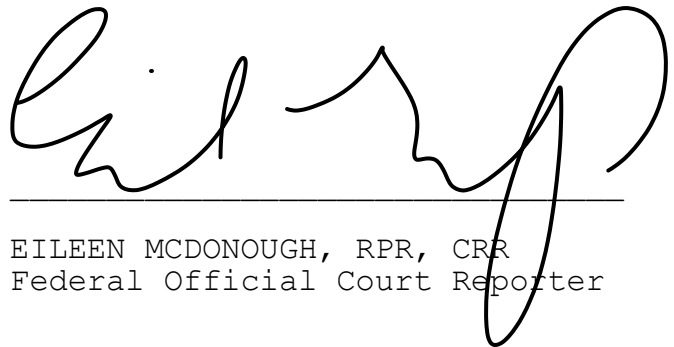
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C E R T I F I C A T I O N

I, EILEEN MCDONOUGH, RPR, CRR, Federal Official  
Realtime Court Reporter, in and for the United States  
District Court for the Northern District of New York,  
do hereby certify that pursuant to Section 753, Title 28,  
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